

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

OLYMPIC FOREST COALITION, a
Washington nonprofit corporation,

Plaintiff,

v.

UNITED STATES FOREST SERVICE, et
al.,

Defendant.

Case No. C07-5344-RBL

ORDER

This matter comes before the Court on proposed Defendant-Intervenors Motion to Intervene [Dkt # 12]. Proposed Defendant-Intervenors argue that they should be allowed to permissively intervene. The Court has considered the record and for the reasons stated below the Court **DENIES** in part and **GRANTS** in part the motion to intervene. Proposed Defendant-Intervenors may intervene, but intervention will be limited to the remedial phase of the suit.

I. BACKGROUND.

In July of 2007, the Olympic Forest Coalition (OFC) filed suit against the United States Forest Service, and Linda Goodman in her official capacity as Regional Forester, for the Pacific Northwest Region. In their complaint the OFC asserts that the Forest Service's decision to proceed with the Bear Creek Saddle timber sale is in violation of the National Environmental Protection Act (NEPA) 42 U.S.C. §§ 4321 et seq., the National Forest Management Act (NFMA) 16 U.S.C. §§ 1600-1614, the Council of Environmental Quality's regulations implementing NEPA, 40 C.F.R. §§ 1500-1508, and the Administrative Procedures Act (APA), 5 U.S.C. §§ 551 et seq.

On October 5, 2007 the American Forest Resource Council (AFRC), Port Angeles Hardwood, the Washington Contract Loggers Association (WCLA), and Larsen's Timber Resource Management moved to

ORDER

1 permissively intervene under Fed. R. Civ. P. 24(b)(2). Plaintiff opposes the motion to intervene. Defendants,
2 have made no objection to the motion to intervene.

3 AFRC represents about 90 private landowners and federal timber purchasers throughout the western
4 United States. [Partian Decl. p. 2, Dkt. # 19]. Port Angeles Hardwood operates a mill located about thirty
5 miles from the Bear Creek site. The Bear Creek timber sale would likely be a source of alder for the mill.
6 WCLA represents the interests of loggers in Washington. WCLA has approximately one thousand members
7 covering about 90% of Washington loggers. Larsen's Timber Resource Management is a logging company
8 working within the Olympic National Forest and focuses on thinning forests to increase the health of the forest
9 and to create jobs.

10 **II. ANALYSIS.**

11 Rule 24(b)(2) allows a court to grant intervention permissively on the following conditions: (1) there
12 is a common question of fact or law between the main action and proposed intervenors claim or defense; (2)
13 the motion to intervene is timely; and (3) there is an independent ground for jurisdiction. *Donnelly v. Glickman*,
14 159 F.3d 405, 412 (9th Cir 1998).

15 **Timeliness.**

16 A court will consider three factors when considering the timeliness of a motion to intervene. These
17 factors are: (1) the stage of proceedings; (2) any prejudice to the other parties; and (3) the reason for and the
18 length of the delay. *Orange County v. Air California*, 799 F.2d 534, 537 (9th Cir. 1986).

19 Plaintiff filed the initial complaint in July of 2007, Defendants answered the complaint in September of
20 2007, and Proposed Defendant-Intervenors filed their motion to intervene in October of 2007. Given the short
21 amount of time between plaintiffs' original complaint and because nothing substantial has yet occurred, the
22 original parties will not be unfairly prejudiced by the addition of Defendant-Intervenors. The Court finds that
23 the motion to intervene is timely.

24 **Common Question of Law or Fact.**

25 Permissive intervention requires the applicants to present a common question of law or fact with the
26 underlying suit. In *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110-11 (9th Cir. 2002), a case
27 involving a NEPA challenge to the Forrest Service's Roadless Area Conservation Rule, defendant intervention
28 was granted. Proposed defendant-intervenors in *Kootenai* were allowed to intervene under Rule 24(b) because

1 they asserted “defenses of the Roadless Rule directly responsive to the claim for injunction.” *Id.* at 1110. The
2 Ninth Circuit also determined that the parties had a common question of fact because they asserted an interest
3 in the use of the land benefitted by the challenged rule. *Id.* at 1110-11.

4 In the present case proposed Defendant-Intervenors would likely present defenses that share common
5 questions of law and fact with the issues of the underlying case. Likewise, proposed Defendant-Intervenors
6 claim an interest in the timber sale because the project would increase the productivity of the forest and would
7 create an economic benefit for its members. The Court finds that proposed Defendant-Intervenors do share
8 a common question of fact and law with the underlying suit.

9 **Independent Jurisdiction.**

10 Proposed Defendant-Intervenors must demonstrate an independent basis for federal subject matter
11 jurisdiction before intervening permissively. In the present case the proposed Defendant-Intervenors seek to
12 intervene as defendants on plaintiff’s NEPA and NFMA claims. Only the federal government can be held liable
13 under NEPA and NFMA. *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1499 n. 11 (9th
14 Cir. 1995). The Ninth Circuit has further explained, “because NEPA requires action only by the government,
15 only the government can be held liable under NEPA. A private party cannot ‘comply’ with NEPA, and
16 therefore, a private party cannot be a defendant in a NEPA compliance action.” *Churchill County v. Babbitt*,
17 150 F.3d 1072, 1082 (9th Cir. 1998). The same reasoning used in *Churchill* to exclude a private party
18 defendant from intervening in a NEPA action also excludes a private party defendant from intervening in a
19 NFMA action. *See Forest Conservation Council*, 66 F.3d, at 1499 n. 11.

20 Proposed Defendant-Intervenors rely on *Kootenai* to support their claim for permissive intervention.
21 In *Kootenai*, the Ninth Circuit granted a non-government defendant-intervenor permissive intervention for the
22 liability phase and the remedial phase under a NEPA claim. In *Kootenai* the Ninth Circuit found that the non-
23 government defendant-intervenors had suffered an injury of its legally protected interests because members of
24 the group benefitted from the regulation that was struck down. *Kootenai*, 313 F.3d, at 1109. Critical
25 distinctions exist between *Kootenai* and the case at bar. In *Kootenai* the government defendants made it clear
26 that they did not intend to fully defend the challenged regulations. Recognizing this the Ninth Circuit
27 determined, “the presence of [defendant] intervenors would assist the court in it’s orderly procedures leading
28 to the resolution of [the] case... .” *Id.* at 1109. In the case at bar the government defendants have made every

1 indication that they intend to fully defend the legality of the Bear Creek Saddle timber sale, and proposed
2 Defendant-Intervenors have not provided evidence that their intervention would assist the Court in resolving
3 the case at bar.

4 The Court finds that proposed Defendant-Intervenors do not have an independent basis for jurisdiction
5 to intervene in the liability phase of the suit because only the federal government can be required to comply
6 with NEPA and NFMA. Therefore, the Court finds that proposed Defendant-Intervenors cannot permissively
7 intervene in the liability phase of the proceedings. However, proposed Defendant-Intervenors may intervene
8 in the remedial phase of the suit. *See Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489 (9th
9 Cir. 1995).

10 **Conclusion.**

11 The Defendant-Intervenors Motion to Intervene (Dkt # 12) is **DENIED** in part and **GRANTED** in part.
12 The Court **DENIES** proposed Defendant-Intervenors permissive intervention in the liability phase of the suit.
13 The Court **GRANTS** proposed Defendant-Intervenors permissive intervention in the remedial phase of the suit.

14 **IT IS SO ORDERED.**

15 Dated this 9th day of November 2007.

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18 RONALD B. LEIGHTON
19 UNITED STATES DISTRICT JUDGE
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